Supreme Court, U.S.
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No. 94-1506

In The

Supreme Court of the United States

October Term, 1994

JEROME S. WAGSHAL,

Petitioner,

v.

BARNETT BANKS, INC., CHARLES E. RICE, ALBERT D. ERNEST, STEPHEN A. HANSEL, ALLEN L. LASTINGER, JR., CHARLES W. NEWMAN and EARL B. HADLOW,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a class member who is an attorney and who knowingly decides not to become a party in a class action have standing to appeal a trial court's order approving a class settlement?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. *Petitioner (Objector and appellant below)*
Jerome S. Wagshal

B. *Respondents (Defendants and appellees below)*
Barnett Banks, Inc.
Albert D. Ernest, Jr.
Earl B. Hadlow
Stephen A. Hansel
Allen L. Lastinger, Jr.
Charles W. Newman
Charles E. Rice

C. *Other Parties (Plaintiffs and appellees below)*
Maurice Bramon
John Paul Decker
John Heller
Harvey Karp, Trustees of Circle Packaging Corp. Pension Plan
Richard Rosenberg
Theodore Rosenberg
Donald F. Sullivan
Florence W. Sullivan
Howard Weiner

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STATEMENT OF THE CASE

Petitioner Jerome S. Wagshal's statement of the case misrepresents and omits relevant facts regarding his participation before the trial court with respect to the approval of the settlement of the class action. The underlying class action, although frivolous from defendants' perspective, had been an expensive, hard fought case that was only settled after extensive discovery and negotiations about the terms of the settlement. In settlement, the defendants agreed to pay $300,000, provide warrants in Barnett Banks, Inc. common stock which were valued at $1,250,000 and pay the costs of administering the settlement fund in exchange for dismissal with prejudice and a general release.

Wagshal, an attorney, knowingly decided not to become a party to these proceedings at any time. Even in Mr. Wagshal's initial brief before the United States Court of Appeals for the Eleventh Circuit, he continued to press the point that he was not a party to the proceedings below.

On January 3, 1992, Judge Schlesinger of the United States District Court for the Middle District of Florida conducted a three-hour evidentiary hearing on the proposed class settlement. (R13-206-9, R16-235-2) Counsel for both Bramon and Barnett then presented argument as to the reasons the settlement should be approved. (R16-235-1 to 40)

Wagshal made an appearance as counsel for himself and told Judge Schlesinger that: "I have not read the court file." (R16-235-44) Wagshal then conceded that he was "not denying that this is a hard-fought litigation."

(R16-235-44) Nevertheless, Wagshal argued in opposition to approval as follows: "As your Honor knows, and is familiar in the law, it's a lot easier to steal a dollar from ten million people than it is to steal $10 million from one person." (R16-235-65) Wagshal went on to conclude: "But this banking system of this country, as your Honor knows, is in a shambles. As bad and as low esteem as lawyers are held by the general public, bankers have come to be held in even lower esteem." (R16-235-67) Attorney Wagshal also presented live testimony concerning his paralegal's review of the proofs of claim sent in by class members. (R16-235-101) On cross-examination by Barnett, the paralegal testified that she had not read any written comments that stated that the settlement was a bad one or should not be approved. (R16-235-111) She also testified she lived with Wagshal. (R16-235-111)

Perhaps even more important was the lack of any evidence in support of Wagshal's claim that the warrants were without value. Wagshal presented absolutely no testimony, expert or otherwise, to contradict the warrant valuations by Howard Lawson and Dillon Read, two investment banking firms that had been retained by plaintiffs and defendants, respectively. Wagshal himself described his ownership of Barnett stock as a "negligible personal stake" and as a "small investment [which] allegedly shows a tiny profit at current market rates." (R12-183-11) Nevertheless, Wagshal argued to the district court that both his "small investment" and "tiny profit" in Barnett were irrelevant because "he has concluded that the settlement should be opposed as a matter of principle – not principal." (R12-183-12) In his very *next* sentence,

Wagshal informed Judge Schlesinger that if he "is instrumental in assisting the plaintiff class, a long line of controlling Supreme Court decisions establish his right to an appropriate award." (R12-183-12) Judge Schlesinger approved the settlement and dismissed with prejudice the Amended Complaint in a seventeen-page Settlement Order entered on January 31, 1992. (R13-206-1)

Wagshal, an unnamed class member, made absolutely no attempt to move to intervene in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure. Wagshal, an attorney who claims experience in class actions, has asserted on a number of occasions that he was not a party to the proceedings below. Wagshal has written that "the class member is *not* a party to the case." (R12-183-3) (emphasis in the original) Wagshal told Judge Schlesinger at the settlement hearing: "I'm not [a] party." (R13-235-98)

In footnote 31 on page 40 of his initial appellate brief, Wagshal reiterated that he was not a party or an attorney to a party in this litigation. Footnote 31 provided in full: "Rule 11 applies to parties and their attorneys, and the O.Cl.Member pointed out that he was neither in this case, but rather had been invited by the Notice to reply with a statement of his position. (183 at 2 *et seq.*)"

Wagshal did not attempt to exercise any of the available procedures by which his interests in the litigation could be protected on appeal. He never moved to intervene. He never opted out of the settlement to pursue his own claim. His only motivation for pursuing this case is to seek an "appropriate award" for "assisting" the class.

SUMMARY OF ARGUMENT

Respondents, Barnett Banks, Inc., Charles E. Rice, Allen L. Lastinger, Jr., Albert D. Ernest, Jr., Earl B. Hadlow, Charles W. Newman, and Stephen A. Hansel (collectively referred to as "Barnett Banks"), submit that there is no clear conflict among the circuits on class members' right to appeal. In addition, the fact pattern present in the instant matter makes this case an inappropriate one for this Court to grant Wagshal's petition for writ of certiorari. Wagshal is an experienced class action attorney who made a knowing decision not to move to intervene as a party at the trial level. Wagshal should not now be allowed to attempt to claim all the benefits of party status.

The interest at issue in an appeal of a class settlement is that of the class as a whole. Each individual member in a Rule 23(b)(3) class may opt out and protect his or her individual interest if they object to the terms of a settlement. The appropriate standing requirement for an appeal should be, at a minimum, party status.

Wagshal espouses a position where any class member can operate on the periphery of a class action, consciously choosing not to intervene or opt out, and then appeal a settlement. As a result, appeals will be brought by people such as Wagshal who lack a sufficient interest in an outcome *to the class as a whole* but do not opt out.

In order to avoid the Wagshal situation of utilizing an appeal to try to obtain a personal award of fees, the trial court should also consider the real interest of the party seeking to intervene. This consideration by the trial court

may be similar to the representation determination made in order to certify a class on behalf of a particular party.

ARGUMENT

Barnett Banks believes that there is no clear conflict among the various United States Court of Appeals regarding a class member's right to bring an appeal of a trial court's order approving a class settlement. In fact, the Court has twice denied certiorari on this issue. *See Croyden Assocs. v. Alleco, Inc.*, 113 S.Ct. 1251 (1993); *Shores v. Sklar*, 493 U.S. 1945 (1990).

Moreover, Wagshal completely omitted from his petition the fact that he was an attorney who made a knowing decision not to participate as a party at the trial level and so informed both the trial court and the appellate court. Consequently, this is not a good case for review.

I. THERE IS NO CLEAR CONFLICT AMONG THE CIRCUITS.

In *Marino v. Ortiz*, 484 U.S. 301 (1988), this Court reiterated the longstanding rule that " . . . only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment. . . . " *Id.* at 304. In response to the Circuit Court's suggestion that there may be exceptions to this general rule, the Court stated "We think the better practice is for such a nonparty to seek intervention for purposes of appeal. . . . " *Id.* Since *Marino*, every circuit court of appeals that has considered the issue of whether a class member may appeal from an appealable

district court order has held that the class member has no standing without having previously moved to intervene.

The United States Court of Appeals for the Eleventh Circuit in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), gave three reasons for holding that individual, non-named class members do not have standing to appeal a final judgment binding on the class members. The Eleventh Circuit stated as follows:

> *First*, such individuals cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure. *Second*, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. *Third*, class actions could become unmanageable and non-productive if each member could individually decide to appeal.

Id. at 628.

The United States Court of Appeals for the Seventh Circuit, contrary to Wagshal's assertion, followed the *Guthrie* reasoning in *Matter of VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992). In *VMS*, which Wagshal cites as the most recent case from the Seventh Circuit on this issue, the Court dismissed a class member's appeal for lack of standing to appeal. In so holding, the Court determined that a class member who served on the Oversight Committee created to oversee the proceedings that were the subject of the appeal was not a party and its participation did not confer upon it a right of appeal. *Id.* at 366-67. In fact, the *VMS* court found the *Guthrie* analysis persuasive. *Id.* at 368. In the instant

case, Wagshal, like the Oversight Committee, is a non-party participating in the proceeding. Therefore, contrary to Wagshal's assertion, this case is consistent with the Eleventh Circuit's decision in *Guthrie*.

Finally, the Third and Ninth Circuit cases cited by Wagshal as conflicting with the Eleventh Circuit either pre-date *Marino* or are factually inapplicable. In the Third Circuit, Wagshal cites to *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993), which concerns derivative claims brought on behalf of a corporation and not class claims brought on behalf of the members of a class. Consequently, that case is distinguishable.

Finally, Wagshal cites *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (5th Cir. 1977), in support of his contention that the Ninth Circuit grants standing to class members who fail to intervene at the district court level. However, *Marshall* is easily distinguishable from the instant case.

In *Marshall*, the class member seeking to challenge the class action settlement agreement was a *named class representative* who brought a cross claim against another named class representative. *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (5th Cir. 1977). In addition, the class representative in *Marshall* was not challenging the fairness of the class action settlement agreement like Wagshal. *Id.* Instead, the class representative objected to the district court maintaining the class action due to alleged conflicts between the class members. *Id.* Such conflicts allegedly made the class action inappropriate. *Id.*

Consequently, there is no clear conflict among the circuits on the issue of class members' standing to appeal.

In apparent agreement, on two recent occasions, this Court has denied certiorari on this issue. *See Croyden Assocs. v. Alleco, Inc.*, 113 S.Ct. 1251 (1993); *Shores v. Sklar*, 493 U.S. 1945 (1990).

II. WAGSHAL INTENTIONALLY CHOSE NOT TO MOVE TO INTERVENE OR OPT OUT.

Even if a conflict among the circuits is assumed, this case is not properly postured for review on this issue. This is not a case where someone lost a right because of a procedural problem. Wagshal intentionally chose not to intervene or opt out. Instead, Wagshal simply seeks a fee for purportedly representing the class even though he was never counsel to the class.

Wagshal's situation provides support for each of the three reasons given by the Eleventh Circuit in *Guthrie* for its holding that only parties can appeal a class settlement. First, Wagshal could not represent the class absent being approved as a representative pursuant to the provisions of Rule 23. Certainly, Wagshal could not be a representative when he had an alternative interest in obtaining a fee recovery for representation. Second, Wagshal had available the opportunity to protect his individual interest through the simple mechanism of opting out. Instead, Wagshal chose to object to the settlement, not opt out or submit a claim. (The settlement required class members to submit a claim in order to obtain the warrants. At the appellate level, Wagshal openly admitted that he did not submit a claim and did not opt out.) Finally, the history of this litigation by Wagshal demonstrates the increased cost that results from allowing any class member to file an

appeal regardless of the interest of the class as a whole. The record concerning Wagshal's activities evidences the expense and time associated with his attempt to obtain a fee award by holding hostage the finalization of the settlement. This type of conduct cannot be endorsed.

The evidence that was presented before the trial court made it absolutely clear that the only interest Wagshal had in the approval of the settlement was a personal one to obtain an award of fees. Wagshal attacked everyone involved in the class action. Wagshal's appellate brief specifically requested that the trial court judge, Judge Schlesinger, be removed from the case. He also made ethical accusations against counsel for Barnett Banks, Inc.. Furthermore, he made similar but less direct accusations against counsel for the class plaintiffs. He attacked the investment banking firms who had given their views on valuation of the warrants without a shred of evidence to contradict their conclusions. Finally, despite being an attorney, he claimed to have directly contacted an officer of a subsidiary of Barnett Banks, Inc. with respect to the settlement. Even worse, he brought to the attention of the appellate court this improper, ex parte, and outside the record activity on his part. Similarly, he has brought this conduct to the attention of this Court in his petition. *Petitioner's Brief* at p. 4, note 2.

Wagshal is no stranger to securities or class action litigation. A Westlaw or Lexis search reveals two prominent, relatively recent cases. The first one involves a 1987 decision of the United States Court of Appeals for the District of Columbia Circuit in *National Association of Mental Health, Inc. v. Califano*, 717 F.2d 1451 (D.C. Cir. 1983). Wagshal filed a class action suit for fees against

purported former non-named class plaintiffs whom he claimed to have previously represented. The appellate court affirmed the dismissal of the complaint.

Most recently, in *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), Wagshal was unsuccessful in the United States Court of Appeals for the District of Columbia Circuit in his appeal of the dismissal of his lawsuit against a mediator and each member of the mediator's law firm based upon the court-ordered mediation's failure to properly handle a suit that he had personally brought. The appellate court again affirmed the dismissal.

While it is conjecture to consider exactly why Wagshal decided not to attempt to become a party in the proceedings below, Wagshal's past, as well as his desire to obtain a fee award, are probably the answer. Wagshal had no concern for the class as a whole. All that he cared about was his own personal financial interest in obtaining a fee award. While inappropriate to detail in this brief, had an evidentiary hearing been held concerning Wagshal's ability to intervene as a party, certain outside the record communications with counsel for both the class plaintiffs, as well as Barnett Banks, Inc., would have been disclosed. In short, Wagshal knowingly decided not to intervene because he knew that the chances of a successful motion were extremely unlikely.

All of the individual circumstances involving Wagshal point to the importance of requiring intervention as a prerequisite to appealing a class settlement. Otherwise, appeals will be brought with respect to virtually any class settlement regardless of the interests of the class as a whole by class members with ulterior motives. When

intervention is required, the trial court can consider the purported intervenors' reasons for requesting intervention at the time intervention is requested.

All of the above issues could have been fully explored by the trial court had Wagshal chosen to try to intervene as a party. Everyone concerned, namely Barnett Banks, Inc., the class representatives and Wagshal would have had a full opportunity to present their views on whether it would be appropriate for Wagshal to become a party in light of his purported interest in this matter. That decisionmaking process never took place because Wagshal knowingly chose not to seek to intervene again, perhaps to avoid the very inquiry that the intervention process affords to the then-existing parties.

CONCLUSION

This Court should deny Wagshal's petition for writ of certiorari.

Respectfully submitted,

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